

Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd A

HIGH COURT (KUCHING) — SUIT NO 22–65 OF 2005–II
HAMID SULTAN JC
6 MARCH 2008

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Civil Procedure — Pleadings — Defence — Defence of pure denial — Whether parties to action bound by pleadings — Whether defendants could put forward case they had not pleaded in their pleadings

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Evidence — Documentary evidence — Admissibility of — Whether MOU was properly admitted and could be relied on as evidence

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The defendants' representation to the plaintiff that the first defendant had been awarded the main contract for the construction and completion of an Islamic Centre Al'Akbar Sinar Islam South East Asia ('the Islamic Centre') in West Kalimantan, Indonesia induced the plaintiff to participate in a joint venture to construct and complete the Islamic Centre. Thereafter the plaintiff by a memorandum of understanding ('MOU') entered into a joint venture with the first defendant. The main purpose of the MOU was for the first defendant to acquire the project to construct the Islamic Centre from the project owner and liaise with local authorities to obtain the necessary approvals and permits required, while the plaintiff was to utilise its expertise to successfully complete construction of the Islamic Centre. As per the terms of the MOU the plaintiff paid the first defendant USD\$40,000 (RM153,200) for it to successfully acquire the project to construct the Islamic centre. It was also agreed in the MOU that if the first defendant was not successful in acquiring the project to construct the Islamic centre, the sum of USD\$40,000 would be refunded to the plaintiff. Thereafter the second defendant requested from the plaintiff additional funds of RM100,000 as interim payment to the first defendant until the issuance of a bank guarantee to the first defendant. In addition the second defendant personally guaranteed the said sum of RM100,000 and agreed to underwrite and refund the same if the project was not successfully launched. Thereafter it came to the plaintiff's attention that the project to construct the Islamic Centre had been awarded to another company and that no further action was taken by the defendants to acquire the project under the MOU. The plaintiff had made repeated attempts to the defendants for the refund of the total sum of RM253,200 but no refund had been made.

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This was the plaintiff's claim for RM253,200 with interest and costs on the

A ground that the defendants had failed to honour a joint venture agreement pursuant to a MOU. The defendants had filed a defence and counterclaim in reply but their defence consisted of a pure denial and a counterclaim, which on the face of it showed no nexus to the plaintiff's claim. The defendants submitted that the MOU which was crucial to the plaintiff's case was never
B tendered or marked as an exhibit and therefore could not be relied on to substantiate the plaintiff's claim. The counterclaim was struck off by the court pursuant to an earlier interlocutory application. The issues in this case were whether defendants whose defence was a pure denial of liability could later put forward a case they had not pleaded in their pleadings and on
C whether the MOU which was not properly admitted could be relied on as evidence.

D **Held**, allowing the claim with costs:

- (1) Pleadings are the essential foundation to analyse disputes. The defendants could not evade liability by simply saying put to 'strict proof'. In the present case where there was evidence to show that money had changed hands, then the evidential burden fell on the
E defendants to show why they were not obliged to pay and put in their defence ie the defendants' version of the case. However, this did not happen in the instant case and instead the defence was badly pleaded by pure denial. Although it was open for the defendants to properly deny liability and require the plaintiff to prove its claim, it was not then
F permissible for the defendants to put forward a case which they had not pleaded (see para 6).
- (2) The right proposition of the law must be that the contents of any disputed documents tendered cannot be deemed to have been proved unless they are proved according to law. This proposition is both within the spirit and intent of the Evidence Act 1950. The court can mark the documents tendered as either enclosures or exhibits but the probative value of these is zero until they are proved according to law. The facts in this case however, did not justify the complaints by the defendants as to whether the MOU could be relied on as evidence because the
G defendants in principle were not denying anything about the MOU and the receipt of the money (see paras 8–10).
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[Bahasa Malaysia summary]

I Representasi defendan kepada plaintiff adalah bahawa defendan pertama telah ditawarkan kontrak utama bagi membina dan menyiapkan Pusat Islam Al'Akbar Sinar Islam South East Asia ('Pusat Islam') di Kalimantan Barat, Indonesia yang mendorong plaintiff untuk menyertai satu usaha sama untuk

membina dan menyiapkan Pusat Islam tersebut. Plaintiff kemudiannya melalui memorandum persefahaman ('MOU') telah memasuki satu usaha sama dengan defendan pertama. Tujuan utama MOU adalah untuk defendan pertama mendapatkan projek untuk membina Pusat Islam tersebut daripada pemilik projek dan menjadi perantara dengan pihak berkuasa tempatan bagi mendapatkan kelulusan dan permit yang dikehendaki, sementara plaintiff menggunakan kepakarannya untuk menyiapkan dengan jayanya Pusat Islam tersebut. Seperti mana terma-terma MOU, plaintiff membayar kepada defendan pertama USD\$40,000 (RM153,200) baginya untuk mendapatkan projek membina Pusat Islam dengan jayanya. Adalah telah dipersetujui juga bahawa dalam MOU tersebut jika defendan pertama tidak berjaya dalam mendapatkan projek untuk membina Pusat Islam tersebut, USD\$40,000 tersebut perlu dikembalikan kepada plaintiff. Selanjutnya, defendan kedua telah meminta daripada plaintiff dana tambahan sebanyak RM100,000 sebagai bayaran sementara kepada defendan pertama sehingga jaminan bank dikeluarkan kepada defendan pertama. Tambahan pula, defendan kedua secara peribadi menjamin jumlah RM100,000 tersebut dan telah bersetuju untuk menjamin dan mengembalikannya jika projek tersebut tidak berjaya dilancarkan. Kemudiannya, plaintiff mendapat tahu bahawa projek untuk membina Pusat Islam tersebut telah diawardkan kepada syarikat lain dan tiada tindakan susulan diambil oleh defendan-defendan untuk mendapatkan projek tersebut di bawah MOU tersebut. Plaintiff telah mencuba berulang kali untuk mendapatkan kembali daripada defendan jumlah keseluruhan RM253,200 tetapi tiada bayaran balik dilakukan.

Ini adalah tuntutan plaintiff untuk RM230,200 bersama-sama dengan faedah dan kos atas alasan bahawa defendan-defendan telah gagal untuk menunaikan perjanjian usaha sama menurut MOU tersebut. Defendan-defendan telah memfailkan pembelaan dan tuntutan balas tetapi pembelaan mereka terdiri daripada penafian semata-mata dan tuntutan balas yang mana secara luarannya menunjukkan tiada hubungan dengan tuntutan plaintiff. Defendan-defendan menghujahkan bahawa MOU yang mana adalah penentu kes plaintiff tidak dikemukakan atau ditandakan sebagai ekshibit dan oleh itu tidak boleh digunakan untuk mengesahkan tuntutan plaintiff. Isu-isu dalam kes ini adalah sama ada defendan-defendan yang pembelaannya adalah penafian liabiliti semata-mata boleh kemudiannya meletakkan kes yang mereka tidak plid di dalam pliding mereka dan sama ada MOU yang tidak secara betul diterima boleh digunakan sebagai bukti.

Diputuskan, membenarkan tuntutan dengan kos:

- (1) Pliding adalah asas penting untuk menganalisis pertikaian. Defendan tidak boleh mengelak liabiliti dengan hanya menyatakan 'pembuktian yang tegas'. Dalam kes ini, di mana terdapat keterangan yang menunjukkan bahawa wang telah bertukar tangan, oleh itu beban

- A pembuktian jatuh kepada defendan untuk membuktikan kenapa mereka tidak bertanggung untuk membayar dan meletakkan di dalam pembelaan mereka seperti versi kes defendan-defendan. Tetapi ini tidak berlaku di dalam kes ini sebaliknya pembelaan diplidkan secara tidak memuaskan dengan penafian semata-mata. Walaupun ianya terbuka kepada defendan untuk menafikan liabiliti secara betul dan meminta plaintif membuktikan tuntutananya, tetapi defendan tidak dibenarkan mengemukakan satu kes yang mereka tidak memplidkannya (lihat perenggan 6).
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- C (2) Kedudukan betul undang-undang adalah bahawa kandungan mana-mana dokumen yang dipertikaikan yang dikemukakan tidak boleh dikatakan telah dibuktikan melainkan ianya telah dibuktikan mengikut undang-undang. Kedudukan ini adalah di dalam semangat dan kehendak Akta Keterangan 1950. Mahkamah boleh menandakan dokumen yang dikemukakan sebagai lampiran atau ekshibit tetapi nilai probatif adalah kosong sehinggalah mereka membuktikannya mengikut undang-undang. Walau bagaimanapun fakta dalam kes ini tidak menjustifikasikan aduan-aduan oleh defendan-defendan sama ada MOU tersebut boleh diharapkan sebagai keterangan kerana defendan secara prinsipnya tidak menafikan sama sekali berkenaan dengan MOU dan penerimaan wang tersebut (lihat perenggan 8–10).]
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Notes

- F For cases on admissibility of documentary evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1090–1099.
- For cases on defence, see paras 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) 5332–5367.

Cases referred to

- G *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd* [2004] 1 MLJ 353 (refd)
Lim Ah Oh & Anor v R [1950] MLJ 269 (refd)
Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor [1998] MLJU 382; [1999] 1 CLJ 601 (refd)
- H *Victoria Insurance Co Ltd v Aik Teong Trading Co* [1973] 1 MLJ 15 (refd)
Yousufali v State of Maharashtra AIR 1968 SC 147 (refd)

Legislation referred to

- I Evidence Act 1950 ss 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 60, 73A
- Satinder Singh Sandhu (Tay Choon Howe with him)(Messrs Sandhu & Co, Advocates) for the plaintiff.*
Lina Wee (Charles Ling Advocates) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiffs' claim in the sum of RM253,200 with interest and costs on the ground that the defendants have failed to honour a joint venture agreement pursuant to a memorandum of understanding ('MOU') dated 11 July 2003.

At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS

[2] The plaintiffs say

- (i) that by the MOU the plaintiffs' has entered into a joint venture with the first defendant to construct and complete an Islamic Centre Al'Akbar Sinar Islam South East Asia in Pontianak, West Kalimantan, Indonesia based on the defendants' representation that the first defendant has been awarded the main contract for the same.
- (ii) as per the terms of MOU a sum of USD40,000 (RM153,200) was paid to the defendants to be used for the participation in ground breaking ceremony of the said project, which was subject to the condition that it is to be refunded, if the launching ceremony is not successful.
- (iii) further, an additional sum of RM100,000,00 was paid as an interim payment to be refunded upon securing funds under a bank guarantee subject to an agreement that the second defendant is to personally guarantee the said sum and to underwrite and refund the said sum if the projects were not successfully launched.
- (iv) the plaintiff complained that only a gathering was held at the site in Batam on 22 August 2003 for the project at Batam, and there was no

A further action taken by the defendants to acquire the project under the MOU. In consequence, the plaintiffs' say they are entitled to the refund of RM253,200.

B [3] The defendants had filed a defence and a counterclaim. The defence and counterclaim reads as follows:

Defence of the first and second defendants

C (1) The first and second defendants have no knowledge of para 1 of the statement of claim.

(2) Paragraphs 2 and 3 of the statement of claim are admitted.

(3) Paragraphs 4, 5, 6 and 7 of the statement of claim are not admitted and the plaintiff is put to strict proof thereof.

D (4) Other than that a gathering was held at the site on 22 August 2003, para 8 of the statement of claim is denied and the plaintiff is put to strict proof thereof.

E (5) In the alternative, the defendants shall say that the said project was officially and successfully launched in Batam, Indonesia on 22 August 2003. The 'gathering held at the site on 22 August 2003' as alleged at para 8 of the statement of claim was the official launching of the said project.

F (6) The defendants deny that the plaintiff is entitled to the refund of the monies stated in para 9 of the statement of claim, and puts the plaintiff to strict proof thereof, as the said project had been successfully launched officially on 22 August 2003.

G (7) The defendants deny paras 10 and 11 of the statement of claim and put the plaintiff to strict proof thereof.

(8) The defendants shall say that the plaintiffs' action was misconceived and that the plaintiffs' suit herein has caused the defendants to suffer loss and damages.

H (9) Save as hereinbefore specifically admitted, the defendants deny each and every allegation contained in the statement of claim as if the same were set forth and traversed seriatim.

Counterclaim

I (10) The defendants repeats paras 1–9 of the defence.
(11) The defendants shall say that the plaintiffs' action herein despite the official launching of the said project on 22 August 2003 has caused the defendants to suffer losses and incur damages.

(12) and the defendants claim:

- (a) Damages;
- (b) Interests at the rate of 8% per annum from the date that the honourable court shall deem fit;
- (c) Costs; and
- (d) And such further orders as the honourable court shall deem fit.

It must be noted here that the counterclaim was struck out by the order of the court pursuant to an interlocutory application, very much earlier. I will elaborate on this a little bit more in the later part of the judgment.

PRELIMINARY OBSERVATION

[4] The defendants without demonstrating much of their case in the pleadings gave extensive evidence to create a version which was totally not pleaded, which I do not intend to set out, save as to show part of the submission of the defendants, to demonstrate the blatant breach of the rules of pleadings.

[5] That part of the submission reads as follows:

The whole action arose from the construction of the Islamic Centre at Pontianak and Batam, Indonesia. The witness, DW-4, testified that he had been lobbying for the project for quite sometime from the Islamic Centre Al' Akbar Sinar Islam South East Asia (hereinafter called 'YABANRI'). When DW-4 had information that the project was available, he realised he could not handle such a big project. He called DW-2. When DW-2 was discussing the project with DW-4, he was overheard by a mutual friend of DW-2 and PW-1, Colonel Saujana bin Bujang. This friend called PW-1, and PW-1 and his co-director in the plaintiff, DW-1, met DW-2 in Singapore. Then DW-1 called DW-3, an international consultant, as there was an arrangement between DW-3 and the plaintiff (ie, DW-1 and PW-1) to source for projects in South East Asia, which projects if DW-3 could secure financial support from his group of international financiers, would where possible, be undertaken by the plaintiff. The group consisting of DW-1, DW-2 and DW-3 flew to Jakarta where they met up with PW-1. They then had a meeting with YABANRI. Around July of 2003, YABANRI decided to have a ground breaking ceremony for the project at Batam, Indonesia. YABANRI sought financial contributions from potential contractors interested in undertaking the project. One of these potential contributors was the first defendant. From the first defendant, YABANRI asked for USD40,000. From that, the MOU dated 11 July 2003 came into existence. After the group attended the launching ceremony on 22 August 2003, they were informed that YABANRI asked an additional RM100,000 from the group as the launching ceremony had over-extended the budget of YABANRI. In essence, this is a straightforward case of contract, even though the

A defendants had to call witnesses from overseas to support their defence. The subject matter of the contract was in Batam, Indonesia. The parties involved in the action are a combination of Malaysians, Australians and Indonesians.

B [6] After having heard the evidence of the defendants, it is crystal clear to me that the version defendants attempted to project to me was never part of their defence. In such circumstances, the court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. The court is not concern what issues the parties have framed for the determination of the court, when such issues cannot be reflective of the issues to be dealt with pursuant to the pleadings. It is totally abhorrent to notions of justice and fair play in a case where there is no dispute as to payment of money and receipt thereof by the defendants; to allow the defendants to give a version why he should not refund the said money when the defendants' version in evidence is not pleaded in the defence and/or intelligently pleaded in the defence. The defendants cannot evade liability by simply saying put to 'strict proof'. In such cases where evidence is given to show money has changed hands, then the evidential burden falls on the defendants to show why they are not obliged to pay and put in their defence, ie the version of the defendants case. This was not done in this case. The defence in this case was so badly pleaded by pure denial that it was no surprise that the counterclaim was struck out by the court very much earlier. Pure denial and then seeking a counterclaim which shows on the face of it no nexus to the plaintiffs' claim or a claim other than the one related to the plaintiffs' claim is a good example of circuitous logic as in this case and in truth is void of merits. Further, such defences are bound to collapse at full trial if the defendants do not just stick to 'strict proof' but attempts to put a version which is not pleaded. Support for my proposition is found in a number of authorities but in my view nothing was stated as eloquently as done by Gopal Sri Ram JCA in the case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd & Anor* [2004] 1 MLJ 353:

H Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty — whether in contract or tort — may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct. So, in *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425, 428, Lord Evershed MR said:

I I think that a defendant — whether he is an underwriter or any other kind of defendant — is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. Where such is the defence, the onus remains throughout upon the plaintiffs' to establish the case they are alleging. Where such is the form of the pleading, it is not only not obligatory upon the defendants but it is not even permissible for them to proceed to put forward

some affirmative case which they have not pleaded or alleged; and it is not, therefore, right that they should, by cross-examination of the plaintiffs' or otherwise, suggest such an affirmative case. The defendants are acting correctly if they follow the course adopted in this case — that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the plaintiffs' seek to make good.

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The result, where such is the form of the defence and of the issues raised, is no doubt such that the judges will watch carefully that defendants, first, do not attempt, by evidence or cross-examination, to establish some affirmative case of which no proper notice has been given by way of pleading to the other side; and second, do not attempt to lead evidence solely directed to the credit of witnesses.

C

LAW ON EXHIBITS

[7] The defendants in respect of admissibility of exhibits complain and submit as follows:

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The documents, particularly the said MOU dated 11 July 2003 and the official receipt dated 10 September 2003 were never tendered/marked as exhibits. Therefore the said documents which were crucial to the plaintiffs' claim could not be relied on to substantiate the plaintiffs' claims. See *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] 4 MLJ 693 and *Jong Ka Hiap & Ors v Yong Soi Fah (Suit No KG 258 of 1987)*, where Richard Malanjum JC (as His Lordship was then) held that the document was not properly admitted as so could not be relied on. See s 73A of Evidence Act 1950.

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In *Yap Choo Hoo v Tahir bin Yasin & Anor* [1970] 2 MLJ 138, Sharma J held:

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I have up to now, perhaps in ignorance, thought that the sole object of preparing an agreed bundle of documents was that such a bundle was prepared under a practice note for the convenience of the court and parties. Such a practice note, however, could not override the provisions of the Evidence Ordinance ...

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Both the bundles (of agreed and disputed documents) are made for the convenience of the court and the parties to facilitate a speedy trial. ... My own view is that a document even forming part of the agreed bundle of documents has got to be proved, although it need not be formally and strictly proved.

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In *Chong Khoo Sang v Pang Ah Chee* [1984] 1 MLJ 377, Shankar J held that:

a document does not become admissible in evidence merely because it has been handed to the adjudicating office and marked as exhibit.

A document cannot be admitted into evidence and marked as such until it has been properly proved.

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However, mindful that the honourable court may opined otherwise, we humbly submit that the plaintiffs' claims were not sustainable in that the defendants had fully discharged what was intended under the contract, that is, the monies

A forwarded to the defendants, even though by a third party, *and not the plaintiff*, was fully utilised towards the successful Ground Breaking Ceremony of the project by YABANRI.

B [8] It is often said that you cannot mark an exhibit until and unless it is proved according to law. In my view, that is not a rule or procedure which is found in the Evidence Act. The right proposition of the law must be that the contents of any disputed documents tendered cannot be deemed to have been proved unless it is proved according to law. This proposition will be within the spirit and intent of Evidence Act 1950 ('EA 1950'). The court can mark it as enclosures or exhibits or put any other label but the probative value will always remain zero. I have in the last one year as judicial commissioner dealt with or in the process of dealing with 50–100 civil trials or so but I hardly found any, in any case, litigants filing documents according to rules of procedure. It is often the case that the litigants are producing part of the documents which they are relying at the date of trial, surprising every one including the judge. What can the court do? Reject it and suffer appellate scrutiny or allow them to file the same taking into consideration most of the cases are old cases, pending hearing for the last six or seven years or more. In such circumstances, I have always taken the view the prudent approach is to allow the litigant to file the documents upon consensus and as far as possible proceed with the trial but be very strict in accepting the truth of the contents of documents if it is not proved according to law. The justification to mark the document as exhibit (though there is not statutory prohibition to do so) may be justified within the concept of real evidence. The learned author *Sarkar on Evidence* (14th Ed) Vol 1 defines it as:

G Again evidence is either real or personal. By real evidence is meant evidence of which, any object belonging to the class of things, is the source, person also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either immediate, where the thing comes under the cognisance of our senses: or reported, where its existence is related to us by others. Personal evidence is that which is afforded by a human agent, either in the way of discourse or by voluntary signs. Evidence supplied by observation of involuntary changes of countenance and deportment comes under the head of real evidence.

H It must be emphasised when a document is marked as exhibit as real evidence on the grounds it is in possession of the parties, you cannot rely on the contents, until and unless the content is proved according to law. This distinction must always be kept in mind.

I Under this concept, court may allow a document to be marked which is in the possession of the parties but give no weight or value to its contents. The methodology of enclosures and exhibits are procedural devices widely in practice in courts. Such procedural methodology is nowhere found in any statutes. As long as there is no prejudice to any parties or is not in breach of

evidential rules at the end of the case the court has some discretion to admit the documents but reject its contents if not proved accordingly to law. Support for what I have said can be found in piece meal basis in a number of cases. In *Victoria Insurance Co Ltd v Aik Teong Trading Co* [1973] 1 MLJ 15 Chang Min Tat J (as His Lordship then was) was of the view that s 60 of the EA 1950 requires all evidence to be direct evidence. On the facts the document was admissible only to prove its existence and receipt but was inadmissible as hearsay evidence when the object was to establish the truth of what was in that statement.

It must be asserted here that document may be hearsay but oral evidence may be given without breaching the best evidence rule. Section 60 of the EA 1950 states:

- (1) Oral evidence shall in all cases whatever be direct, that is to say:
 - (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
 - (b) if it refers to a fact which could be heard; it must be the evidence of a witness who says he heard it;
 - (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
 - (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.
- (2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.
- (3) If oral evidence refers to the existence or condition of any material thing including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

Section 60 of the EA 1950 reflects the best evidence rule in respect of oral evidence. The word 'direct' will mean original evidence ie the evidence of one who has personal knowledge as opposed to second hand information or hearsay evidence. Under this section oral evidence must be direct ie the testimony must be of the person who perceived the fact through the medium of his own senses. This section emphasises that evidence should always be direct because direct evidence is the best evidence. Hearsay evidence under

A this section must be rejected. Hearsay evidence is mainly rejected for the following reasons namely: (a) it is not the best evidence; (b) it is not made on oath; (c) it cannot be tested by cross-examination; (d) the court has no opportunity for watching the demeanor of the person making the statement; (e) admission of hearsay evidence will allow the opportunity for commission of fraud; (f) there is a depreciation of truth in the process of repetition; (g) the court may have to waste its time in listening to idle gossip or rumour. However there are number of exception to hearsay rule [see ss 17–39 and 73A of the EA 1950]. If the rules permit the admissibility of hearsay evidence, it is based on the grounds of necessity rather than precision. The probative value of such evidence must be very much less as opposed to direct evidence (see *Lim Ah Oh & Anor v R* [1950] MLJ 269). In *Yousufali v State of Maharashtra* AIR 1968 SC 147 the Supreme Court of India has held that contemporaneous photographs of the relevant incident are held to be admissible. However the accuracy of such photographs must be proved by calling the photographer or any other person who has direct knowledge of its accuracy. In *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [1999] 1 CLJ 601 Augustine Paul JC (as he then was) has dealt with the relevant issues extensively in an articulate manner and in crux His Lordship's view as I understand is that a document can be admitted under any label but if the party wants to rely on the truth of its contents when it is disputed by the other party, it needs to be proved according to law. His Lordship himself admits that there is much controversy in the procedure in relation to agreed bundles and disputed bundles etc. I take the view these controversies have been created by the court themselves when the law of evidence is clear if the contents is disputed it must be proved according to law and justice is not concern with what label is given to the documents ie agreed bundles or non-agreed bundles, exhibits, enclosures, etc. It is as simple as that and nothing more. The learned judge of the apex court opined:

G An agreed bundle of document in a civil action is a useful tool in expediting the hearing process. Parties may agree to the inclusion of documents in such a bundle with or without conditions. The evidentiary value of a document in an agreed bundle of documents would therefore depend on the condition subject to which it was included in the bundle. In this regard I refer to *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] 4 MLJ 693 where Peh Swee Chin FCJ in delivering the majority judgment of the Federal Court said at p 521,

H It goes without saying that either or any of the parties to any particular civil case can effectively object to the inclusion of any document in an agreed bundle of documents, and further he is at liberty to impose conditions upon which any particular document is included therein, if he agrees in the first place to such inclusion.

I *In the absence of any express conditions regarding the inclusion of any of the documents in the agreed bundle of documents*, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.

First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.

A

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

B

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

C

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any 'written hearsay' contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

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On the effect of a document in an agreed bundle of documents where formal proof of its execution has been dispensed with useful reference may be made to *Lionel Edwards Ltd v State of West Bengal* AIR 1967 Cal 191 where AK Das J said at p 194:

Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or other wise. In respect of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by way of cross-examination or otherwise. In this connection our attention was drawn to a case reported in *Madholal Sindhu v Asian Assurance Co Ltd* AIR 1954 Bom 305, where Bhagawati J pointed out that where the correctness of the contents of a document produced in court is in issue that should be proved by calling the executor of the document as a witness. The learned judge pointed out that the issue before him was not whether the documents were written by X and that if that had been the only issue, the proof of the signatures, or the handwriting could have been enough. What was in issue however before the learned judge was apart from X having signed or written the documents, whether the contents of the documents were correct. That could not be proved by a witness who had no personal knowledge whatever about the contents. The view propounded here is not in conflict with the view I have taken in the case before us. The contents become evidence on being marked on admission, formal proof being dispensed with, whatever might be their evidentiary value and the evidentiary value has to be judged in the light of other evidence and circumstances.

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- A It is therefore clear that where a document is admitted with formal proof being dispensed with the party agreeing to its admission does not thereby accept the truth of the contents. He is entitled to challenge the contents of the document by way of cross-examination or otherwise. I must make it clear that the cross-examination that I have just referred to is cross-examination of other witnesses and not the maker of the document. It cannot refer to the maker of the document as formal proof of the document has been dispensed with which means that he need not be made available for cross-examination. If he is required to be produced for cross-examination then the object of dispensing with formal proof of the document will be defeated. If cross-examination of the maker is required in order to establish the truth of the contents of the document then the party requiring such cross-examination ought not to have agreed to dispense with formal proof. Where he agrees to dispense with formal proof the other party is not obliged to produce the maker for cross-examination. In that event the evidentiary value of the document is determined by cross-examination of other witnesses produced by either party or by calling other witnesses on the issue concerned and the circumstances of the case. The reservation of a right to cross-examine when there is agreement to dispense with formal proof of a document is therefore superfluous as it is implicit in such an agreement. In the light of what I have said thus far the dispensation of formal proof of the police report with a right to cross-examination in this case can only refer to cross-examination of other witnesses called by the parties for the purpose of challenging the truth of the contents of the report. The sequence of events in this case reveals that the defendants closed their case without calling any evidence. They have therefore deprived themselves of the opportunity of challenging the truth of the contents of the police report. Furthermore, by agreeing to the inclusion of the police report in the agreed bundle of documents they have thereby effectively prevented the plaintiff from calling the maker of the report to tender it in evidence which he is entitled to do so.
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- C
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- [9] If parties want to avoid admission 'of documents at trial stage, it will be prudent for them to obtain unless orders' at the case management stage, failing which the court may exercise its discretion to admit the document, subject to the contents being proved according to law.
- G

- [10] Having said all that, the facts in this case does not justify to entertain the complaint of the defendants as in this case oral evidence was given and the defendants in principle are not denying anything about the MOU and the receipt of the money.
- H

EVIDENCE

- I [11] In this case PW1, Saidi bin Abang Samsudin gave evidence to say the followings:

- [1] The plaintiff is part of the Jepak Group of Companies which also includes Jepak Holdings Sdn Bhd;

- [2] PW1 is both a director and shareholder of both the plaintiff and Jepak Holdings Sdn Bhd; A
- [3] The second defendant represented to PW1 that the first defendant had been awarded the main contract for the construction of an Islamic Centre at Pontianak, West Kalimantan, Indonesia to induce the plaintiff to participate in a joint venture to construct and complete the Islamic Centre; B
- [4] The main purpose of the memorandum of understanding dated 11 July 2003 was for the first defendant to acquire the project at Pontianak, West Kalimantan from the project owner and liaise with local authorities and obtain the necessary approvals and permits required by the local government and non-government bodies, while the plaintiff was to utilise its expertise to successfully complete construction of the said project; C
- [5] The plaintiff paid USD\$40,000 to the first defendant for it to successfully acquire the project at Pontianak, West Kalimantan from the project owner and have a ground breaking ceremony for it. If the same was not successful, the sum of USD\$40,000 will be refunded by the second defendant to the plaintiff; D
- [6] The payment of USD\$40,000 was made by the plaintiff through Jepak Holdings Sdn Bhd; E
- [7] To relate the background information relating to the need, and the first defendant's failure, to obtain a bank guarantee from the project owner for purposes of the project; F
- [8] The second defendant requested from the plaintiff additional funds of RM100,000 as interim payment to the first defendant until the issuance of a bank guarantee to the first defendant and the second defendant would refund the same if the bank guarantee was not issued by 30 September 2003; G
- [9] The plaintiff paid the additional sum of RM100,000 through Jepak Holdings Sdn Bhd. As requested by the second defendant which was accepted by the second defendant without any protest; H
- [10] The background information relating to the engagement of Edward Moal Juga as the common solicitor for the parties and the instructions in relation to the payment of the RM100,000 and the preparation of the official receipt dated 10 September 2003; I
- [11] PW1 attended the 22 August 2003 gathering and noticed that the project had been awarded to another company, ADHY KARYA and not the first defendant;
- [12] What transpired during and after the 22 August 2005 gathering, in

- A** particular nothing was done by the first defendant to secure and commence the construction of the project;
- B** [13] Despite the fact that ADHY KARYA had been awarded the contract, the second defendant asked PW1 not to worry as the second defendant represented to PW1 that the bank guarantee had been obtained but when PW1 asked to view the bank guarantee, the defendants were not able to produce the original copy;
- C** [14] The plaintiff has made repeated demands to the defendants for the refund of the total sum of RM253,200 but no refund of the sum has been made to date.
- [12] Very importantly the solicitor, PW2 Edward Moal Juga who prepared the MOU said the followings:
- D** [1] PW2 was the common solicitor for the plaintiff and defendants in the transactions/dealing in respect of the joint venture to construct the Islamic Centre;
- [2] PW2's role as the common solicitor;
- E** [3] In respect of the official receipt dated 10 September 2003, it was prepared by PW2 pursuant to the joint instructions of Saidi bin Abang Samsudin and Yong Kar Chuing;
- F** [4] Further, the official receipt dated 10 September 2003 was in respect of the payment by the plaintiff of RM100,000 being an interim payment to the first defendant until the issuance of a bank guarantee to the first defendant and the second defendant would refund the same if the bank guarantee was not issued by 30 September 2003.
- G** [5] PW2 met Yong Kar Chuing in person to hand over a cheque of RM100,000 and to get the latter to sign the official receipt dated 10 September 2003;
- [6] Yong Kar Chuing signed the official receipt before PW2 and PW2 attested the same by signing and affixing his personal stamp;
- H** [7] Yong signed after he has read and was satisfied with the official receipt; Yong did not indicate to PW2 that the former has difficulty understand the content of the official receipt and did not ask PW2 to explain.
- I** [13] I have heard the evidence, submission of parties in detail. I take the view the plaintiffs' claim must be allowed. My reasons and findings are as follows:
- (i) The plaintiffs have paid the sum as claimed. This matter in substance is not in dispute.

- (ii) The claim by the plaintiffs that nothing was done by the first defendant to secure and commence the construction of the project, has merits when contrasted with a defence mainly on bare denials and strict proof. **A**
- (iii) The plaintiff also had at the commencement of trial amended the statement of claim to add a prayer 'alternatively such liquidated sum as found due and owing'. **B**

[14] For reasons stated above, I allow the plaintiffs' claim with the following orders:

- (i) The first defendant to pay the plaintiff the sum of RM153,200 with interest at 8% per annum from the date of filing until the date of realisation. **C**
- (ii) The defendants to pay the plaintiffs the sum of RM100,000 with interest at 8% per annum from the date of filing until the date of realisation. **D**
- (iii) The defendants to pay the costs to the plaintiffs. The getting up fees shall not exceed RM30,000. If costs cannot be agreed, the plaintiffs are at liberty to tax the costs. **E**

I hereby order so.

Claim allowed with costs.

Reported by K Nesan **F**

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